FILE COPY

SEP 1958

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 333

JAMES S. O'ROURKE, JR. and
JOAN O'ROURKE,
Petitioners and
Appellees below,

vs.

HENRY W. SILL and
BERNICE E. SILL,
Respondents and
Appellants below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN, AND BRIEF IN SUPPORT THEREOF

KELLY, KELLY AND KELLY,
PHILLIP C. KELLY,
Counsel for Petitioners.

Business Address:
Reynolds Building,
Jackson, Michigan.

AMERICAN BRIEF AND RECORD COMPANY, FIFTY MARKET AVENUE, N.W.,
GRAND RAPIDS 2, MICHIGAN — PHONE GL 8-5326

INDEX TO CASES AND AUTHORITIES CITED

	Page
City of Grand Rapids vs. Powers, 89 Mich. 94	5
Constitution of the State of Michigan, Art. II, Sec. 13	3, 5
Constitution of the State of Michigan, Art. II, Sec. 16	3, 5
Dation vs. Ford Motor Co., 314 Mich. 152	5
Federal Code Annotated, Sec. 1257 (3), Title 28	2
Hilton vs. Briggs, 54 Mich. 265	5
Montgomery vs. Henry, 10 Mich. 19	5
Noyes vs. Hillier, 65 Mich. 636	5
Prince vs. Clark, 81 Mich. 167	5
Sipes vs. McGhee, 316 Mich. 614	5
Township of Caledonia vs. Rose, 94 Mich. 216	5
U. S. Constitution, 7th Amendment	2, 4
U. S. Constitution, 14th Amendment	3, 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. ----------

JAMES S. O'ROURKE, JR. and
JOAN O'ROURKE,
Petitioners and
Appellees below,

vs.

HENRY W. SILL and
BERNICE E. SILL,
Respondents and
Appellants below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN, AND BRIEF IN SUPPORT THEREOF

TO: The Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

May it Please the Court:

Petitioners, James S. O'Rourke, Jr. and Joan O'Rourke, respectfully petition this Honorable Court for a Writ of Certiorari to the Supreme Court of Michigan.

(a) The opinion of the Supreme Court of Michigan, is reported at 89 N. W. 2 463, and a copy thereof is appended hereto, as Exhibit "A".

(b) The grounds on which the jurisdiction of this Court is invoked are as follows: The opinion of the Supreme

Court of Michigan was filed April 15, 1958. Order Denying Rehearing was filed on June 17, 1958, and judgment, as directed by the Supreme Court, was entered in the trial court on July 1, 1958.

Jurisdiction of the United States Supreme Court to review by Writ of Certiorari in this case is conferred by Section 1257 (3), Title 28, *Federal Code Annotated*, as follows:

> "Final judgments or decrees rendered by the highest court of a state in which decision could be had may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By Writ of Certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * of United States."

(c) The question presented for review is: Where, at close of *plaintiffs'* proofs in a jury trial, the trial court directs the jury to return a verdict for defendants, which verdict is reversed on appeal to the Supreme Court, were defendants denied their constitutional right to jury trial, by the further order of the Supreme Court directing the trial Court to enter judgment for plaintiffs without allowing defendants to present their evidence to the jury?

(d) The following provisions of the Constitutions of the United States and of the State of Michigan are involved in this case:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."
>
> 7th Amendment to *United States Constitution.*

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

14th Amendment, *United States Constitution.*

"The right of trial by jury shall remain, but shall be deemed to be waived in all civil cases unless demanded by one of the parties in such manner as shall be prescribed by law."

Constitution of the State of Michigan, Article II, Section 13.

"No person shall * * * be deprived of life, liberty or property, without due process of law."

Constitution of the State of Michigan, Article II, Section 16.

(e) Plaintiffs sued defendants for rent and insurance premiums alleged to be due under a lease of real estate in which plaintiffs were lessors, defendants lessees.

Defendants, in their pleadings, denied owing plaintiffs as alleged, filed a Plea of Recoupment and demanded a jury trial. At the close of the evidence for plaintiffs, the trial court directed a verdict for defendants.

This was reversed by the Supreme Court but, instead of remanding the case to the trial court for a new trial, the Supreme Court directed the trial court to enter judgment for plaintiffs in the full amount of their claim.

(f) The Federal question of the right of defendants to a jury trial, under the Constitutions of the United States and the State of Michigan, was first raised by the opinion of the Michigan Supreme Court directing judgment as previously set forth. This Federal question was promptly presented to the Michigan Supreme Court by an Application for Re-hearing under the rules of that Court. Rehearing was denied without a written opinion being filed. It is the judgment entered in the trial court by direction of the Supreme Court, without allowing defendants to put in their proofs, for which review by Certiorari is sought.

(b) Argument

Plaintiffs' Declaration alleged that defendants were indebted to plaintiffs for rent and insurance premiums under a Lease. Defendants' Answer denied these allegations and demanded a trial by jury. Defendants also filed a Plea of Recoupment, but this was not the sole ground of their defense. They also claimed that they had made payments under the Lease for which they had not been credited and that the insurance for which plaintiffs claimed they were liable, covered a period of time beyond their occupancy of the premises (Appendix 14a-15a). The issues thus formed presented questions of fact to be determined by the jury after hearing the evidence, not only of plaintiffs but also of defendants. The action of the Supreme Court resulted in a judgment being entered for plaintiffs on their evidence alone and without giving defendants the opportunity of presenting their defense to the jury. This was in violation of the rights of defendants under the following Constitutional provisions:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."
>
> 7th Amendment to *United States Constitution.*

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> 14th Amendment to *United States Constitution.*

> "The right of trial by jury shall remain, but shall be deemed to be waived in all civil cases unless de-

manded by one of the parties in such manner as shall be presented by law."

Constitution of the State of Michigan, Article II, Section 13.

"No person shall * * * be deprived of life, liberty or property, without due process of law."

Constitution of the State of Michigan, Article II, Section 16.

"Every person is entitled to his day in court whenever his interests are involved, and to due notice of the proceedings, and to reasonable opportunity to appear and defend."

Noyes vs. Hillier, 65 Mich. 636;
Prince vs. Clark, 81 Mich. 167;
City of Grand Rapids vs. Powers, 89 Mich. 94;
Township of Caledonia vs. Rose, 94 Mich. 216.

"Personal judgments cannot rest on fictions of law nor be pronounced without an opportunity for hearing."

Hilton vs. Briggs, 54 Mich. 265.

"No court can lawfully adjudge any person to be responsible in any shape without giving him a proper opportunity to be heard in his own behaf."

Montgomery vs. Henry, 10 Mich. 19.

"Due process of law requires notice and opportunity to be heard."

Dation vs. Ford Motor Company, 314 Mich. 152.

"Right of due process means that every person having property rights affected by litigation is entitled to reasonable opportunity to appear and defend his interest."

Sipes vs. McGhee, 316 Mich. 614.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a Writ of Certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted.

KELLY, KELLY AND KELLY,
PHILLIP C. KELLY,
Counsel for Petitioners.

STATE OF MICHIGAN

SUPREME COURT

HENRY W. SILL and BERNICE B. SILL,

Plaintiffs and Appellants,

-vs-

JAMES S. O'ROURKE, JR., and JOAN O'ROURKE,

Defendants and Appellees.

BEFORE THE ENTIRE BENCH.

CARR, J.

Prior to June 1, 1953, plaintiffs owned and occupied certain premises in Summit Township, Jackson County, described as 1825 Spring Arbor Road. They had operated thereon an automobile sales and service business. Certain structures used in connection with the business were located on the property, including a garage, a quonset hut, and a concrete slab on which cars were exhibited.

On the date mentioned, June 1, 1953, plaintiffs leased the property in question to defendants for a three year period, at a monthly rental of $500.00 per month, "to be occupied for automobile sales and service and in no case to be used for any business deemed extra hazardous on account of fire". In the event that any installment of rent remained unpaid for more than 15 days, defendants' liability was increased to the sum of $525.00.

buildings and the roofs thereon It was further provided in the lease that "Second parties shall promptely pay when due all water electric sewage and utility charges for services on or to the leased premises * * *."

At the time of the execution of the lease that there was located on the premises a well, equipped with a pump or pumps, designated to furnish water for use in connection with business operations thereon It may be noted in this connection that defendant James S O'Rourke Jr , had managed the sales and service agency for plaintiffs during a period of some months prior to the execution of the lease It may be assumed thathe was familiar with the source of the water supply After defendants went into possession or or about June 1 1953 they formed a corporation to which was issued a franchise for the operation of an automobile sales agency They proceeded with that business and also a service business involving the handling of automobiles

In August 1953 lessees complained to plaintiffs that the water supply was inadequate Apparently there was a shortage of rainfall at the time and in the expectation that the condition would correct itself within a brief period no action was taken to deepen the well or otherwise obtain an added supply of water However the complaints continued and at some time during the following winter plaintiffs and defendants agreed to deepen the well at their joint expense This agreement was carried out the [illegible] that the work was actually done It is a matter

four months of 1934). Plaintiffs instituted the instant action to recover the rental for said months at the rate of $525.00 per month, and also to recover a portion of the amount paid by them for insurance, assumed by defendants under the lease, together with interest on said amounts.

Defendants filed answer to the declaration alleging that plaintiffs had failed to perform all of the covenants assumed by them under the contract. More specific reference to the defense indicated was made in a claim of recoupment attached to the answer, which claim was based, in part, on the theory that plaintiff lessors were obligated to furnish defendants with sufficient water to permit the proper carrying on of the business for which the premises had been leased. The further claim was made that lessors had failed to maintain the roof of the garage, with resulting damage to defendants. Subsequently defendants sought leave to amend their claim of recoupment by adding thereto allegations that lessors had wrongfully evicted them from the premises, and also by bringing in matters not directly connected with the lease or the acts of the parties thereunder. Plaintiffs filed objections to such proposed amendments, which resulted in an order allowing defendants to counterclaim for damages with respect to the alleged failure on the part of plaintiffs to furnish water service, for failure to keep the garage roof in repair, and for the wrongful eviction. Leave to [illegible] other matters sought to be raised.

permit the proper carrying on of the business in question, that plaintiffs had failed to do so, that, in consequence, the lessees were deprived of the full use and enjoyment of the premises, and that plaintiffs were barred from the recovery of rent on the theory of a constructive eviction. Following argument by counsel the court announced that he would reserve decision on the motion.

Defendants introduced the testimony of a witness who became an employee of the plaintiffs on or about March 1, 1953, and who continued with the defendants when their lease went into effect. The testimony of said witness indicates that at times the water supply was not satisfactory prior to the execution of the lease, and likewise thereafter. However, the trial judge, following the testimony of the witness, proceeded to determine the motion as of the close of plaintiffs' proofs. As appears from the record before us, verdict in favor of defendants was directed on the ground that plaintiffs had assumed the obligations claimed on behalf of defendants in their motion, and could not, in consequence, recover rent. In the course of the argument reference was made by the circuit judge to the pleaded recoupment, to which counsel for defendants replied, in substance, that, if verdict was directed as requested, consideration would be given to the matter of putting in proof on the counterclaim. Apparently it was concluded that, the motion of defendants having been granted, the counterclaim would not be sub-

properly directed.

In support of the claim that there was no implied covenant binding lessors to furnish sufficient water to enable the premises to be used for the purpose for which they were leased, counsel have cited Morton v. Hanes, 162 Mich. 366. There plaintiff brought an action on a lease to recover rent of a house that the lessee intended to use for roomers. A plea of the general issue was filed to plaintiffs' declaration, and a claim of recoupment based on averments that the lessor had falsely and fraudulently represented thatthe house could be heated by the furnace therein. On the trial it was the position of defendants' counsel that the failure of the heating plant to properly function so as to permit the premises to be used for the purpose intended caused the consideration for the agreement to pay rent to wholly fail. In rejecting such claim it was said:

> "The general rule undoubtedly is that, in the absence of fraud, there is no implied covenant, that premises are fit for the purpose for which they are leased. Doyle v. Railway Co., 147 US 413 (13 Sup Ct. 333); Jaffe v. Harteau, 56 NY 398 (15 Am Rep 548); Clark v. Babcock, 23 Mich. 164; Rhoades v. Seidel, 139 Mich. 608 (102 NW 1025)
>
> "In Young v. Collett, 63 Mich. 331 (29 NW 850), upon which defendant relies, it is said:
>
> "'When a landlord rents a building, and in the lease, as in this case, limits its use to a certain specified purpose, and the tenant agrees to do no more than keep the same in as good repair as when taken, it is evident that the landlord recommends the building as suitable for that purpose in the condition it then is, if there are no modifying clauses to the contrary contained in the lease, and it should be so held; otherwise there would be no con-

"Where, however, the landlord makes false or fraudulent represnetations as to material facts not obvious to the lessee, or, knowing such facts, of which the lessee is escusably ignorant, and which would seriously impair the value of the lease, conceals them, he may be held liable to the lessee for damages incurred in consequence thereof in an action for fraud and deceit, or the lessee may recoup such damages in the landlord's suit for rent. Steefel v. Rothschild, 179 NY 273 (72 NE 112); Pryor v. Foster, 1 NYS 774; Norris v. McFadden, 159 Mich. 424 (124 NW 54).

"While the tenant, by remaining in possession, waives the right to rescind the lease, he does not waive his claim for damages for the fraud and deceit whereby he was induced to enter into the lease. Pryor v. Foster, supra.

"We are therefore of the opinion that the court erred in refusing to permit defendant to show the alleged false and fraudulent representations as to the furnace set up in her ~~m~~tice."

The statement of the court in the above cited case with reference to the general rule governing the existence of an implied covenant in cases of this nature is in accord with general recognized principles applicable thereto. In Thompson on Real Property, Vol 3, Section 1369, in discussing liability of a lessor for water furnished to his lessee it is said:

"In the absence of agreement, a landlord is not bound to pay tax rates for city water used by the tenant, though the house is piped therefor. The landlord is under no greater obligation then he would be to pay for gas, because the house demised is piped for gas. The lessee can not recover amounts paid in this account without showing in som way that the lessor was liable for the water rates. No agreement to pay them could be implied because the water was essential to the premises for the purpose for which they were leased. It can hardly be said that the landlord impliedly agreesnto pay for whatever is essential to the use of the premises which he leases."

On the date mentioned, June 1, 1953, plaintiffs leased the property in question to defendants for a three year period, at a monthly rental of $500.00 per month, "to be occupied for automobile sales and service and in no case to be used for any business deemed extra hazardous on account of fire". In the event that any installment of rent remained unpaid for more than 15 days, defendants' liability was increased to the sum of $525.00. The lessees were required to keep the premises insured, and to maintain the interior thereof in good condition and repair. Plaintiffs assumed responsibility with reference to the exterior of the

In August 1953 lessees complained to plaintiffs that the water supply was inadequate. Apparently there was a shortage of rainfall at the time and in the expectation that the condition would correct itself within a brief period no action was taken to deepen the well or otherwise obtain an added supply of water. However, the complaints continued and at some time during the following winter plaintiffs and defendants agreed to deepen the well at their joint expense. This agreement was carried out the record not showing when the work was actually done. It is a matter of inference that thereafter the water supply was sufficient for the purpose of the business conducted on the premises. Other difficulties arose between the parties and on or about April 20 1954 defendants vacated the property (at that time they had not paid the rental for the month of November 1953 or for the first

claim of recoupment by adding thereto allegations that lessors had wrongfully evicted them from the premises, and also by bringing in matters not directly connected with the lease or the acts of the parties thereunder. Plaintiffs filed objections to such proposed amendments, which resulted in an order allowing defendants to counterclaim for damages with respect to the alleged failure on the part of plaintiffs to furnish water service, for failure to keep the garage roof in repair, and for the wrongful eviction. Leave to amend was denied as to other matters sought to be raised.

The case was brought on for trial before the circuit judge and a jury on January 28, 1957. The testimony of Henry W. Sill was introduced on behalf of plaintiffs, which testimony fairly disclosed the facts claimed with reference to the water shortage and the action taken to correct the situation in that respect. Plaintiffs then rested, and counsel for defendants moved for a directed verdict on the ground that, under the lease, plaintiffs were bound to furnish defendants sufficient water to

the close of plaintiffs' proofs. As appears from the record before us, verdict in favor of defendants was directed on the ground that plaintiffs had assumed the obligations claimed on behalf of defendants in their motion, and could not, in consequence, recover rent. In the course of the argument reference was made by the circuit judge to the pleaded recoupment, to which counsel for defendants replied, in substance, that, if verdict was directed as requested, consideration would be given to the matter of putting in proof on the counterclaim. Apparently it was concluded that, the motion of defendants having been granted, the counterclaim would not be submitted on the merits.

From the judgment entered in defendants' favor, following the directed verdict, plaintiffs have appealed. It is their claim in substance that there was no implied covenant under the lease requiring them to furnish sufficient water to defendants to enable the latter to carry on their business, and that they had assumed no obligation, by agreement express or implied, to do so. On behalf of appellees it is contended that the verdict in their favor was

"The general rule undoubtedly is that, in the absence of fraud, there is no implied covenant, that premises are fit for the purpose for which they are leased. Doyle v. Railway Co., 147 US 413 (13 Sup Ct. 333); Jaffe v. Harteau, 56 NY 398 (15 Am Rep 548); Clark v. Babcock, 23 Mich. 164; Rhoades v. Seidel, 139 Mich. 608 (102 NW 1025)

"In Young v. Collett, 63 Mich. 331 (29 NW 850), upon which defendant relies, it is said:

"'When a landlord rents a building, and in the lease, as in this case, limits its use to a certain specified purpose, and the tenant agrees to do no more than keep the same in as good repair as when taken, it is evident that the landlord recommends the building as suitable for that purpose in the condition it then is, if there are no modifying clauses to the contrary contained in the lease, and it should be so held; otherwise there would be no consideration for the tenants' agreement to pay rent. Tyler v. Disbrow, 40 Mich. 415; Smith vs. Marrable, 11 Mees & W. 5; West Side Sav. Bank v. Newton, 76 NY 616; Salisbury v. Marshal, 4 Car P 65.'

"This language was unnecessary to the determination of the case. The defendants had given up the room to the plaintiff for repairs, and he had taken possession for that purpose and taken up the floor of the lodgeroom, renderingthe room untentable, --

"'And it was while in this situation the defendants were unable to get the landlord to make the needed change and repairs. This neglect to make the change and repairs necessary, was, under all the circumstances, an eviction

"In the absence of agreement, a landlord is not bound to pay tax rates for city water used by the tenant, though the house is piped therefor. The landlord is under no greater obligation than he would be to pay for gas, because the house demised is piped for gas. The lessee can not recover amounts paid in this account without showing in some way that the lessor was liable for the water rates. No agreement to pay them could be implied because the water was essential to the premises for the purpose for which they were leased. It can hardly be said that the landlord impliedly agrees to pay for whatever is essential to the use of the premises which he leases."

In Leighton v. Ricker, 173 Mass. 564 (54 NE 254), an action was brought to recover for rent of a hotel. Defendant lessee sought to counter claim for monies paid by him for water, apparently on the theory that he had made such payments by mistake. There was no covenant in the lease relating to the matter, and nothing was said therein about payments for water. Judgment was rendered in the trial court in plaintiff's favor. In affirming that result, it was said:

"We think that the ruling was right. The water rates did not constitute a lien on the premises which the plaintiff ultimately would have been obliged to pay, as in the case of taxes. Turner v. Revere Water Co., 171 Mass. 329. The payment by the defendants lacked therefore the justification which perhaps it is possible that such a fact might have furnished under some circumstances. The defendants cannot recover without showing that the plaintiff was liable in some way for the water rates. It is not contended that she agreed to pay them. And we do not think that any agreement on her part to pay them can be implied, because the water was essential to the premises for the purpose for which they were leased. It hardly can be said, we think, that a landlord impliedly agrees to pay for whatever is essential to the use of the premises which he leases. There was nothing in the conduct of the plaintiff to constitute a liability by estoppel, and the fact that the defendants may have misapprehended the effect of the lease can, of course, furnish no grounds for recovery against the plaintiff."

In accord with the foregoing is the statement in 32 Am. Jur. p. 172, that:

"A landlord unless he has agreed to do so, is not ordinarily bound to furnish water to his tenant and in the absence of any obligation under the lease to furnish, or have furnished, water for the use of the tenant, an independent promise by the landlord to furnish adequate water must be based upon sufficient consideration."

See also, 51, CJS, pp 950--952.

As before noted, the lease in the instant case was wholly silent with reference to the furnishing of water. The question is presented, however, whether there was a collateral independent promise, either express or implied, binding the plaintiff lessors to furnish to defendants for the period of the lease a sufficient amount of water to enable the latter to carry on their business on the premises in a satisfactory manner. Counsel for defendants rely on

10 years, for restaurant and lunch stand purposes. Nothing was said in the lease with reference to the water supply. There was, however, testimony in the case that one of the defendants had informed the lessees that the water supply was sufficient for the business, such statement apparently being made after the execution of the lease but indicating the intention of the parties with reference thereto. Difficulties arose and as a result, the defendant lessors attempted to force an adjustment of differences by interfering with the water supply. Plaintiff lessees employed a well driller with the purpose in mind of obtaining a water supply of their own. Lessors attempted to interfere with this operation, but apparently the well was constructed

Because of the repeated difficulties between the parties, the tenants brought suit in equity against the lessors to enjoin interference with their leasehold, and for the recovery of damages. Lessors filed a cross-bill asking cancellation of the lease. Following trial, the plaintiffs had decree, from which defendants appealed. It was their position that they were under no obligation to furnish water to the plaintiffs, and that parol testimony was not competent for the purpose of establishing an express or implied agreement with reference to the matter. On appeal, this Court took the view that the general rule with reference to parol evidence does not operate to bar such proof when offered to establish a collateral agreement operating as an inducement for entering into a written contract.

the conclusions reached, the decree of the trial court was affirmed.

It will be noted that the question at issue had reference to the right of the tenants to be furnished water through the facilities that were in operation at the time they made their agreement. Such supply apparently was adequate. The Court was not concerned with the situation that would have been presented had the existing well proved inadequate to service the restaurant, and the decision may not be regarded as authority for the proposition that in such event the lessors would have been bound to furnish other or added facilities. Furthermore, the acts of which plaintiffs complained in their suit for injunctive relief and for damages amounted to affirmative interference with the contractual obligation that defendants Wiseman had assumed. The lessees sought relief in equity to the end that they might be protected in their contractual rights from interference by lessors. The questions at issue were not, as to the relief sought, analogous to those involved in the case now before us. In view of the factual differences, the Stimac case is not controlling here.

In the case at bar the right of the defendant lessees to use the water from the well on the premises is not in question. It does not appear that plaintiffs at any time interfered in any way, shape or manner with that right. On the contrary, by their conduct they recognized the right of the tenants to insist on a continuance of the situation existing at the time of the lease, and with refer-

to keep the water supply at all times adequate for the demands thereon. Had municipal water service been obtained, defendants, under the terms of the lease, would have been chargeable with the cost of the water furnished from such source. It may be assumed, also, that after the well was deepened by the joint efforts of the parties, each paying a proportionate share of the cost, the entire premises were available for the purposes for which defendants desired to use them. During such period, however, the rent was not paid.

Counsel for defendants cite also Grinnell Bros. v. Asiuliewicz, 241 Mich. 186. As in the Stimac case, that was an action by a tenant to enjoin interference with the right of beneficial enjoyment under the lease. It furnishes another instance in which the lessor by affirmative action interfered with the lessee in carrying on of the latter's business. The controlling issue was not the existence of an implied contract but, rather, whether defendants had been guilty of such a breach of a covenant of the lease as to justify the granting of equitable relief.

Under the facts in the instant case, insofar as they are disclosed by the record before us, there is no factual basis to support the claim that plaintiffs, either expressly or impliedly, assumed the obligation to furnish water facilities in addition to those on the premises, if necessary to meet the demands of defendants' business. A contrary holding would result

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON

JOURNAL ENTRIES

TUESDAY, JULY 1, 1958
PRESENT: HONORABLE THOMAS N. ROBINSON,
CIRCUIT JUDGE, PRESIDING
Court was opened for business in due form.

HENRY W. SILL and BERNICE E. SILL,
Plaintiffs,

vs. AC-229

JAMES S. O'ROURKE, JR., and JOAN O'ROURKE,
Defendants.

In this cause an appeal having been taken by the plaintiffs to the Supreme Court of the State of Michigan, from the judgment of no cause of action in favor of defendant entered herein January 30, 1957 and on said appeal said Supreme Court reversed said judgment and remanded the case to this Court with instructions and directions to set aside the said judgment entered in defendants' favor on January 30, 1957, and to enter a judgment for the plaintiffs in accordance with the remand of the said Supreme Court, and such remand, order and direction of the Supreme Court being on file herein, wherein and whereby said Supreme Court finds and determines that plaintiffs are entitled to a judgment for the amount of rental and insurance claimed, together with interest thereon.

THEREFORE, in accordance with the aforesaid remand and directions, it is ordered and adjudged that the judgment of no cause of action in favor of the defendants entered herein on January 30, 1957, be and it is hereby vacated, set aside and held for nought.

And, pursuant to the aforesaid remand and directions of the said Supreme Court, it is further ordered and adjudged that the plaintiffs recover against both of said defendants, their damage as aforesaid in the sum of THREE THOUSAND EIGHT HUNDRED THIRTEEN DOLLARS and SEVEN CENTS ($3,813.07), together with costs and charges to be taxed, and have execution therefor; and this action being brought upon a written instrument executed by the said defendants, who were, at the date of the execution thereof, husband and wife, the writ or writs of execution be endorsed with the fact that this judgment is upon a written instrument executed by said defendants who at the time of the execution and delivery thereof were husband and wife.

See also, 51, CJS, pp 950--952.

As before noted, the lease in the instant case was wholly silent with reference to the furnishing of water. The question is presented, however, whether there was a collateral independent promise, either express or implied, binding the plaintiff lessors to furnish to defendants for the period of the lease a sufficient amount of water to enable the latter to carry on their business on the premises in a satisfactory manner. Counsel for defendants rely on Stimac v. Wissman, 342 Mich.20. There the defendants who owned certain real estate located near the city of South Haven had constructed thereon a building suitable for use as a drivein restaurant. No municipal water supply was available to the property. One of the defendants owned an adjoining parcel, subject otoa life interest in her parents, on which there was an operating well. Water was piped from this well to the restaurant. Such was the condition existing when the plaintiffs leased the property for a term of

water to the plaintiffs, and that parol testimony was not competent for the purpose of establishing an express or implied agreement with reference to the matter. On appeal, this Court took the view that the general rule with reference to parol evidence does not operate to bar such proof when offered to establish a collateral agreement operating as an inducement for entering into a written contract. Clare County Savings Bank v. Featherly, 173 Mich. 292, 302.

In passing on the situation disclosed by the record in the Stimac case, attention was directed to the fact that water was being supplied to the building at the time the restaurant business was commenced, and at the time the lease was executed. This Court concluded from the facts disclosed by the proofs that there was an implied, if not an express, undertaking on the part of the defendants to furnish water for the duration of the lease. In accordance with

Under the facts in the instant case, insofar as they are disclosed by the record before us, there is no factual basis to support the claim that plaintiffs, either expressly or impliedly, assumed the obligation to furnish water facilities in addition to those on the premises, if necessary to meet the demands of defendants' business. A contrary holding would result in imposing on the lessors an obligation substantially equivalent to a covenant therefor. The trial judge was in error in directing a verdict for the defendants. On the record before us plaintiffs were, and are, entitled to judgment for the amount of the rental and insurance claimed, together with interest.

The case is remanded with directions to set aside the judgment, and to enter judgment in accordance herewith.

In the case at bar the right of the defendant lessees to use the water from the well on the premises is not in question. It does not appear that plaintiffs at any time interfered in any way, shape or manner with that right. On the contrary, by their conduct they recognized the right of the tenants to insist on a continuance of the situation existing at the time of the lease, and with reference to which the parties contracted. Plaintiffs and defendants alike were familiar with the situation existing on the 1st of June, 1953. They knew the source from which the water used in the business was being obtained. We may infer that they contemplated a continuance of the situation in such respect, but there is nothing in this record that implied an undertaking on the part of the lessors that if for any reason the water supply from the well should fail, or become inadequate, plaintiffs would in some way change the situation by added facilities in order

/s/ THOMAS N. ROBINSON
Circuit Judge, Presiding
By Assignment

STATE OF MICHIGAN)
) ss
COUNTY OF JACKSON)

I, Floyd J. Poole, Clerk of the County of Jackson, and of the Circuit Court thereof, the same being a Court of Record, having a seal, do hereby certify that I have compared the attached copy of Journal Entries AC-229 Henry W. Sill and Bernice E. Sill vs. James S. O'Rourke, Jr., and Joan O'Rourke, with the original of record in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Circuit Court for the County of Jackson, at the City of Jackson, this 15th day of August, A.D., 1958

Floyd J. Poole, Jackson County Clerk

/s/ Darlene Stimer, Dpty.

Exhibit B

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 333

JAMES S. O'ROURKE, JR. and
JOAN O'ROURKE,
Petitioners and
Appellees below

vs.

HENRY W. SELL and
BEATRICE E. SELL,
Respondents and
Appellants below

OPINION OF THE SUPREME COURT OF MICHIGAN AND JUDGMENT OF THE CIRCUIT COURT OF JACKSON COUNTY, MICHIGAN, PURSUANT THERETO

KELLY, KELLY AND KELLY
PHILIP C. KELLY,
Counsel for Petitioners
Business Address:
Reynolds Building,
Jackson, Michigan

AMERICAN BRIEF AND RECORD COMPANY, FIFTY MARKET AVENUE, S.W.
GRAND RAPIDS 2, MICHIGAN — PHONE GL 6-3126

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. ---

JAMES S. O'ROURKE, JR. and
JOAN O'ROURKE,
Petitioners and
Appellees below.

vs.

HENRY W. SILL and
BERNICE E. SILL,
Respondents and
Appellants below.

OPINION OF THE SUPREME COURT OF MICHIGAN AND JUDGMENT OF THE CIRCUIT COURT OF JACKSON COUNTY, MICHIGAN, PURSUANT THERETO

KELLY, KELLY AND KELLY,
PHILLIP C. KELLY,
Counsel for Petitioners.
Business Address:
Reynolds Building,
Jackson, Michigan.

OPINION OF THE SUPREME COURT OF MICHIGAN

STATE OF MICHIGAN
SUPREME COURT

HENRY W. SILL and
BERNICE E. SILL,
Plaintiffs and Appellants,

vs.

JAMES S. O'ROURKE, JR., and
JOAN O'ROURKE,
Defendants and Appellants.

BEFORE THE ENTIRE BENCH.

CARR, J.

Prior to June 1, 1953, plaintiffs owned and occupied certain premises in Summit Township, Jackson County, described as 1825 Spring Arbor Road. They had operated thereon an automobile sales and service business. Certain structures used in connection with the business were located on the property, including a garage, a quonset hut, and a concrete slab on which cars were exhibited.

On the date mentioned, June 1, 1953, plaintiffs leased the property in question to defendants for a three year period, at a monthly rental of $500.00 per month, "to be occupied for automobile sales and service and in no case to be used for any business deemed extra hazardous on account of fire". In the event that any installment of rent remained unpaid for more than 15 days, defendants' liability was increased to the sum of $525.00. The lessees were required to keep the premises insured, and to maintain the interior thereof in good condition and repair. Plaintiffs assumed responsibility with reference to the exterior of the buildings and the roofs thereon. It was further provided in the lease that "second parties shall promptly pay when due all water, electric, sewage and utility charges for services on or to the leased premises * * *."

At the time of the execution of the lease there was located on the premises a well equipped with a pump or pumps, designed to furnish water for use in connection with business operations thereon. It may be noted in this connection that defendant James S. O'Rourke, Jr., had managed the sales and service agency for plaintiffs during a period of some months prior to the execution of the lease. It may be assumed that he was familiar with the source of the water supply. After defendants went into possession on or about June 1, 1953, they formed a corporation to which was issued a franchise for the operation of an automobile sales agency. They proceeded with that business and also a service business involving the handling of automobiles.

In August, 1953, lessees complained to plaintiffs that the water supply was inadequate. Apparently there was a shortage of rainfall at the time, and in the expectation that the condition would correct itself within a brief period no action was taken to deepen the well or otherwise obtain an added supply of water. However, the complaints continued, and at some time during the following winter plaintiffs and defendants agreed to deepen the well at their joint expense. This agreement was carried out, the record not showing when the work was actually done. It is a matter of inference that thereafter the water supply was sufficient for the purpose of the business conducted on the premises. Other difficulties arose between the parties and on or about April 20, 1954, defendants vacated the property. (At that time they had not paid the rental for the month of November, 1953, or for the first four months of 1954). Plaintiffs instituted the instant action to recover the rental for said months at the rate of $525.00 per month, and also to recover a portion of the amount paid by them for insurance, assumed by defendants under the lease, together with interest on said amounts.

Defendants filed answer to the declaration alleging that plaintiffs had failed to perform all of the covenants assumed by them under the contract. More specific reference to the defense indicated was made in a claim of recoupment attached to the answer, which claim was based, in part, on the theory that plaintiff lessors were obligated to furnish defendants with sufficient water to permit the proper carrying on of the business for which the premises had been leased. The further claim was made that

lessors had failed to maintain the roof of the garage, with resulting damage to defendants. Subsequently defendants sought leave to amend their claim of recoupment by adding thereto allegations that lessors had wrongfully evicted them from the premises, and also by bringing in matters not directly connected with the lease or the acts of the parties thereunder. Plaintiffs filed objections to such proposed amendments, which resulted in an order allowing defendants to counterclaim for damages with respect to the alleged failure on the part of plaintiffs to furnish water service, for failure to keep the garage roof in repair, and for the wrongful eviction. Leave to amend was denied as to other matters sought to be raised.

The case was brought on for trial before the circuit judge and a jury on January 29, 1957. The testimony of Henry W. Sill was introduced on behalf of plaintiffs, which testimony fairly disclosed the facts claimed with reference to the water shortage and the action taken to correct the situation in that respect. Plaintiffs then rested, and counsel for defendants moved for a directed verdict on the ground that, under the lease, plaintiffs were bound to furnish defendants sufficient water to permit the proper carrying on of the business in question, that plaintiffs had failed to do so, that, in consequence the lessees were deprived of the full use and enjoyment of the premises, and that plaintiffs were barred from the recovery of rent on the theory of a constructive eviction. Following argument by counsel the court announced that he would reserve decision on the motion.

Defendants introduced the testimony of a witness who became an employee of the plaintiffs on or about March 1, 1953, and who continued with the defendants when their lease went into effect. The testimony of said witness indicates that at times the water supply was not satisfactory prior to the execution of the lease, and likewise thereafter. However, the trial judge, following the testimony of the witness, proceeded to determine the motion as of the close of plaintiffs' proofs. As appears from the record before us, verdict in favor of defendants was directed on the ground that plaintiffs had assumed the obligations claimed on behalf of defendants in their motion, and could not, in consequence, recover rent. In the course of the argument reference was made by the circuit judge to the pleaded

recoupment, to which counsel for defendants replied, in substance, that, if verdict was directed as requested, consideration would be given to the matter of putting in proof on the counterclaim. Apparently, it was concluded that, the motion of defendants having been granted, the counterclaim would not be submitted on the merits.

From the judgment rendered in defendants' favor, following the directed verdict, plaintiffs have appealed. It is their claim in substance that there was no implied covenant under the lease requiring them to furnish sufficient water to defendants to enable the latter to carry on their business, and that they had assumed no obligation, by agreement, express or implied, to do so. On behalf of appellees it is contended that the verdict in their favor was properly directed.

In support of the claim that there was no implied covenant binding lessors to furnish sufficient water to enable the premises to be used for the purpose for which they were leased, counsel have cited Morton vs. Hanes, 162 Mich. 366. There plaintiff brought an action on a lease to recover rent of a house that the lessee intended to use for roomers. A plea of the general issue was filed to plaintiff's declaration, and a claim of recoupment based on averments that the lessor had falsely and fraudulently represented that the house could be heated by the furnace therein. On the trial it was the position of defendant's counsel that the failure of the heating plant to properly function so as to permit the premises to be used for the purpose intended caused the consideration for the agreement to pay rent to wholly fail. In rejecting such claim it was said:

> "The general rule undoubtedly is that, in the absence of fraud, there is no implied covenant that premises are fit for the purpose for which they are leased. *Doyle v. Railway Co.*, 147 U. S. 413 (13 Sup. Ct. 333); *Jaffe v. Harteau*, 56 N. Y. 398 (15 Am. Rep. 548); *Clark vs. Babcock*, 23 Mich. 164; *Rhoades vs. Seidel*, 139 Mich. 608 (102 N.W. 1025).
>
> "In Young v. Collett, 63 Mich. 331 (29 N.W. 850), upon which defendant relies, it is said:
>
> "'When a landlord rents a building, and in the lease, as in this case, limits its use to a certain speci-

fied purpose, and the tenant agrees to do no more than keep the same in as good repair as when taken, it is evident that the landlord recommends the building as suitable for that purpose in the condition it then is, if there are no modifying clauses to the contrary contained in the lease, and it should be so held; otherwise there would be no consideration for the tenants' agreement to pay rent. *Tyler v. Dishrow*, 40 Mich. 415; *Smith v. Marrable*, 11 Mees & W. 5; *West Side Sav. Bank v. Newton*, 76 N. Y. 616; *Salisbury v. Marshal*, 4 Car. P. 65.' "

"This language was unnecessary to the determination of the case. The defendants had given up the room to the plaintiff for repairs, and he had taken possession for that purpose and taken up the floor of the lodgeroom, rendering the room untentable. —

" 'And it was while in this situation the defendants were unable to get the landlord to make the needed change and repairs. This neglect to make the change and repairs necessary, was, under all the circumstances, an eviction.'

"Where, however, the landlord makes false or fraudulent representations as to material facts not obvious to the lessee, or, knowing such facts, of which the lessee is excusably ignorant, and which would seriously impair the value of the lease, conceals them, he may be held liable to the lessee for damages incurred in consequence thereof in an action for fraud and deceit, or the lessee may recoup such damages in the landlord's suit for rent. *Steefel v. Rothschild*, 179 N. Y. 273 (72 N. E. 112); *Pryor v. Foster*, 1 N. Y. S. 774; *Norris v. McFadden*, 159 Mich. 424 (124 N. W. 54).

"While the tenant, by remaining in possession, waives the right to rescind the lease, he does not waive his claim for damages for the fraud and deceit whereby he was induced to enter into the lease. *Pryor v. Foster*, supra.

"We are therefore of the opinion that the court erred in refusing to permit defendant to show the al-

leged false and fraudulent representations as to the furnace set up in her notice."

The statement of the court in the above cited case with reference to the general rule governing the existence of an implied covenant in cases of this nature is in accord with generally recognized principles applicable thereto. In Thompson on Real Property, Vol. 3, Section 1369, in discussing liability of a lessor for water furnished to his lessee it is said:

> "In the absence of agreement, a landlord is not bound to pay tax rates for city water used by the tenant, though the house is piped therefor. The landlord is under no greater obligation than he would be to pay for gas, because the house demised is piped for gas. The lessee can not recover amounts paid on this account without showing in some way that the lessor was liable for the water rates. No agreement to pay them could be implied because the water was essential to the premises for the purpose for which they were leased. It can hardly be said that the landlord impliedly agrees to pay for whatever is essential to the use of the premises which he leases."

In Leighton vs. Ricker, 173 Mass. 564 (54 N. E. 254), an action was brought to recover for rent of a hotel. Defendant lessee sought to counter claim for monies paid by him for water, apparently on the theory that he had made such payments by mistake. There was no covenant in the lease relating to the matter, and nothing was said therein about payments for water. Judgment was rendered in the trial court in plaintiff's favor. In affirming that result, it was said:

> "We think that the ruling was right. The water rates did not constitute a lien on the premises which the plaintiff ultimately would have been obliged to pay, as in the case of taxes. Turner v. Revere Water Co., 171 Mass. 329. The payment by the defendants lacked therefore the justification which perhaps it is possible that such a fact might have furnished under some circumstances. The defendants cannot recover without showing that the plaintiff was liable in some

way for the water rates. It is not contended that she agreed to pay them. And we do not think that any agreement on her part to pay them can be implied, because the water was essential to the premises for the purpose for which they were leased. It hardly can be said, we think, that a landlord impliedly agrees to pay for whatever is essential to the use of the premises which he leases. There was nothing in the conduct of the plaintiff to constitute a liability by estoppel, and the fact that the defendants may have misapprehended the effect of the lease can, of course, furnish no ground for recovery against the plaintiff."

In accord with the foregoing is the statement in 32 Am. Jur., p. 172, that:

"A landlord unless he has agreed to do so, is not ordinarily bound to furnish water to his tenant and in the absence of any obligation under the lease to furnish, or have furnished, water for the use of the tenant, an independent promise by the landlord to furnish adequate water must be based upon sufficient consideration."

See also, 51 C. J. S., pp. 950-952.

As before noted, the lease in the instant case was wholly silent with reference to the furnishing of water. The question is presented, however, whether there was a collateral independent promise, either express or implied, binding the plaintiff lessors to furnish to defendants for the period of the lease a sufficient amount of water to enable the latter to carry on their business on the premises in a satisfactory manner. Counsel for defendants rely on Stimac vs. Wissman, 342 Mich. 20. There the defendants who owned certain real estate located near the city of South Haven had constructed thereon a building suitable for use as a drivein restaurant. No municipal water supply was available to the property. One of the defendants owned an adjoining parcel, subject to a life interest in her parents, on which there was an operating well. Water was piped from this well to the restaurant. Such was the condition existing when the plaintiffs leased the property for a term

of 10 years, for restaurant and lunch stand purposes. Nothing was said in the lease with reference to the water supply. There was, however, testimony in the case that one of the defendants had informed the lessees that the water supply was sufficient for the business, such statement apparently being made after the execution of the lease but indicating the intention of the parties with reference thereto. Difficulties arose and as a result, the defendant lessors attempted to force an adjustment of differences by interfering with the water supply. Plaintiff lessees employed a well driller with the purpose in mind of obtaining a water supply of their own. Lessors attempted to interfere with this operation, but apparently the well was constructed.

Because of the repeated difficulties between the parties, the tenants brought suit in equity against the lessors to enjoin interference with their leasehold, and for the recovery of damages. Lessors filed a cross-bill, asking cancellation of the lease. Following trial, the plaintiffs had decree, from which defendants appealed. It was their position that they were under no obligation to furnish water to the plaintiffs, and that parol testimony was not competent for the purpose of establishing an express or implied agreement with reference to the matter. On appeal, this Court took the view that the general rule with reference to parol evidence does not operate to bar such proof when offered to establish a collateral agreement operating as an inducement for entering into a written contract. Clare County Savings Bank vs. Featherly, 173 Mich. 292, 302.

In passing on the situation disclosed by the record in the Stimac case, attention was directed to the fact that water was being supplied to the building at the time the restaurant business was commenced, and at the time the lease was executed. This Court concluded from the facts disclosed by the proofs that there was an implied, if not an express, undertaking on the part of the defendants to furnish water for the duration of the lease. In accordance with the conclusions reached, the decree of the trial court was affirmed.

It will be noted that the question at issue had reference to the right of the tenants to be furnished water through the facilities that were in operation at the time they made their agreement. Such supply apparently was adequate. The Court was not concerned with the situation that would

have been presented had the existing well proved inadequate to service the restaurant, and the decision may not be regarded as authority for the proposition that in such event the lessors would have been bound to furnish other or added facilities. Furthermore, the acts of which plaintiffs complained in their suit for injunctive relief and for damages amounted to affirmative interference with the contractual obligation that defendants Wissman had assumed. The lessees sought relief in equity to the end that they might be protected in their contractual rights from interference by lessors. The questions at issue were not, as to the relief sought, analogous to those involved in the case now before us. In view of the factual differences, the Stimac case is not controlling here.

In the case at bar the right of the defendant lessees to use the water from the well on the premises is not in question. It does not appear that plaintiffs at any time interfered in any way, shape or manner with that right. On the contrary, by their conduct they recognized the right of the tenants to insist on a continuance of the situation existing at the time of the lease, and with reference to which the parties contracted. Plaintiffs and defendants alike were familiar with the situation existing on the 1st of June, 1953. They knew the source from which the water used in the business was being obtained. We may infer that they contemplated a continuance of the situation in such respect, but there is nothing in this record that implied an undertaking on the part of the lessors that if for any reason the water supply from the well should fail or become inadequate, plaintiffs would in some way change the situation by added facilities in order to keep the water supply at all times adequate for the demands thereon. Had municipal water service been obtained, defendants, under the terms of the lease, would have been chargeable with the cost of the water furnished from such source. It may be assumed, also, that after the well was deepened by the joint efforts of the parties, each paying a proportionate share of the cost, the entire premises were available for the purposes for which defendants desired to use them. During such period, however, the rent was not paid.

Counsel for defendants cite also Grinnell Bros. vs. Asiuliewicz, 241 Mich. 186. As in the Stimac case, that was an

action by a tenant to enjoin interference with the right of beneficial enjoyment under the lease. It furnishes another instance in which the lessor by affirmative action interfered with the lessee in carrying on of the latter's business. The controlling issue was not the existence of an implied contract but, rather, whether defendants had been guilty of such a breach of a covenant of the lease as to justify the granting of equitable relief.

Under the facts in the instant case, insofar as they are disclosed by the record before us, there is no factual basis to support the claim that plaintiffs, either expressly or impliedly, assumed the obligation to furnish water facilities in addition to those on the premises, if necessary to meet the demands of defendants' business. A contrary holding would result in imposing on the lessors an obligation substantially equivalent to a covenant therefor. The trial judge was in error in directing a verdict for the defendants. On the record before us plaintiffs were, and are, entitled to judgment for the amount of the rental and insurance claimed, together with interest.

The case is remanded with directions to set aside the judgment, and to enter judgment in accordance herewith.

JUDGMENT OF THE CIRCUIT COURT OF JACKSON COUNTY, MICHIGAN

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON

JOURNAL ENTRIES

TUESDAY, JULY 1, 1958.

PRESENT: HONORABLE THOMAS N. ROBINSON, CIRCUIT JUDGE, PRESIDING.

Court was opened for business in due form.

HENRY W. SILL and
BERNICE E. SILL,
Plaintiffs,

vs.

AC-229

JAMES S. O'ROURKE, JR., and
JOAN O'ROURKE,
Defendants.

In this cause an appeal having been taken by the plaintiffs to the Supreme Court of the State of Michigan, from the judgment of no cause of action in favor of defendant entered herein January 30, 1957, and on said appeal said Supreme Court reversed said judgment and remanded the case to this Court with instructions and directions to set aside the said judgment entered in defendants' favor on January 30, 1957, and to enter a judgment for the plaintiffs in accordance with the remand of the said Supreme Court, and such remand, order and direction of the Supreme Court being on file herein, wherein and whereby said Supreme Court finds and determines that plaintiffs are entitled to a judgment for the amount of rental and insurance claimed, together with interest thereon:

THEREFORE, in accordance with the aforesaid remand and directions, it is ordered and adjudged that the judgment of no cause of action in favor of the defendants entered herein on January 30th, 1957, be and it is hereby vacated, set aside and held for nought.

And, pursuant to the aforesaid remand and directions of the said Supreme Court, it is further ordered and adjudged that the plaintiffs recover against both of said defendants their damages as aforesaid in the sum of THREE THOUSAND EIGHT HUNDRED THIRTEEN DOLLARS and SEVEN CENTS ($3,813.07), together with costs and charges to be taxed, and have execution therefor; and this action being brought upon a written instrument executed by the said defendants, who were, at the date of the execution thereof, husband and wife, the writ or writs of execution be endorsed with the fact that this judgment is upon a written instrument executed by said defendants who at the time of the execution and delivery thereof were husband and wife.

(s) Thomas N. Robinson,
Circuit Judge Presiding
By Assignment.

STATE OF MICHIGAN
SS.
COUNTY OF JACKSON

I, Floyd J. Poole, Clerk of the County of Jackson, and of the Circuit Court thereof, the same being a Court of Record, having a seal, do hereby certify that I have compared the attached copy of Journal entries AC-229 Henry W. Sill and Berhice E. Sill vs. James S. O'Rourke, Jr., and Joan O'Rourke, with the original of record in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Circuit Court for the County of Jackson, at the City of Jackson, this 15th day of August, A. D. 1958.

Floyd J. Poole,
Jackson County Clerk.
(s) Darlene Stimer,
Deputy.

LE COPY

Supreme Court, U.S.
FILED
SEP 17 1958
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 333

JAMES S. O'ROURKE, JR. and
JOAN O'ROURKE,
Petitioners and
Appellees below,

vs.

HENRY W. SILL and
BERNICE E. SILL,
Respondents and
Appellants below.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

KLEINSTIVER AND ANDERSON,
Attorneys for Respondents and Appellants.

Business Address:
1504-08 National Bank Bldg.,
Jackson, Michigan.

AMERICAN BRIEF AND RECORD COMPANY, FIFTY MARKET AVENUE, N.W.,
GRAND RAPIDS 2, MICHIGAN — PHONE GL 8-5326

INDEX TO CASES AND AUTHORITIES CITED

	Page
Binne vs. Bench, 302 Mich. 327, at p. 330	3
Vol. 3 Callaghan's Michigan Pleading & Practice, Sec. 36.125, pages 465-466	4
C. L. of 1948, Sec. 615.10	4
Compiled Laws of 1948, Sec. 691.21	5
Vol. 1, Corpus Juris Secun., page 1418, Sec. 138	4
16A Corpus Juris Secundum, Sec. 567, pp. 541-544	5
Michigan Constitution of 1908, Art. VII, Sec. 5	5
Michigan Court Rule 23, Sec. 3	3
Michigan Court Rule No. 72, Sec. (g)	4
Vol. 1, Michigan Law & Practice Encyclopedia, Sec. 34, p. 151	4
Michigan St. Ann., Sec. 27.34	5
Mich. St. Anno. 27.835	4
Smith vs. McCluskey, 254 Mich. 145, p. 151	3
Smith vs. Smith, 262 Mich. 60, at p. 61	3
Tomlinson vs. Tomlinson, 338 Mich. 274, 276	5
Truax vs. Heartt, 135 Mich. 150, at p. 154	4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. ----------

JAMES S. O'ROURKE, JR. and
JOAN O'ROURKE,
Petitioners and
Appellees below.

vs.

HENRY W. SILL and
BERNICE E. SILL,
Respondents and
Appellants below.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

Respondents submit the following by way of correction and supplying omissions in petitioners' petition and supporting brief.

(1) The decision of the Michigan Supreme Court is now officially reported in 352 Mich. 318.

(2) The validity of the lease and occupancy thereunder is admitted. The suit is for unpaid rent for time of occupancy and insurance premiums under the lease. Payment is not pleaded but petitioners (defendants below) seek to avoid liability to plaintiffs under the lease by claiming *constructive eviction* in that water supply was insufficient and that thereby a claimed covenant was breached. Petitioners also plead recoupment claiming damages by reason of (a) insufficient water supply, (b) leaky roof, and

(c) claimed unlawful dispossession. Petitioners asked for directed verdict on the ground of constructive eviction for failure to supply sufficient water (which motion was granted) and thereupon abandoned their claims of recoupment, offering no testimony thereon.

On appeal the Michigan Supreme Court in an exhaustive, well reasoned opinion, reversed, holding that there was no covenant to furnish water, hence there could be no constructive eviction as claimed. No evidence was offered on the recoupment. The Michigan Supreme Court said (352 Mich. at p. 330):

> "On the record before us plaintiffs were, and are, entitled to judgment for the amount of the rental and insurance claimed, together with interest.
>
> "The case is remanded with directions to set aside the judgment, and to enter judgment in accordance herewith."

ARGUMENT

I.

Defendants having abandoned their claims of recoupment and not having pleaded payment as an affirmative defense as required by rule, are not entitled to a trial as to defenses not pleaded as required by rule, nor as to issues abandoned.

Under Michigan law and rules of pleading, payment, in whole or in part, is a substantive affirmative defense, which defendant must specially plead and prove.

> *Smith vs. Smith*, 262 Mich. 60, at p. 61;
> *Smith vs. McCluskey*, 254 Mich. 145, p. 151;
> *Binne vs. Bench*, 302 Mich. 327, at p. 330.
> (Also many other cases cited in said decisions).

Michigan Court Rule 23, expressly so provides. Section 3 of that rule provides:

> "Sec. 3. *The facts constituting any affirmative defense such as payment* • • • (specifying numerous others) • • • in whole or in part • • • must be plainly set forth in the defendant's answer."

Section 5 of the same rule provides:

> "Sec. 5. In actions at law, each separate defense affirmatively pleaded, and each separate cause of action by way of recoupment or set-off *shall be stated in a separate division* of the answer, and *each of such divisions shall be complete in itself and the divisions* numbered consecutively."

That payment was not pleaded was raised in the trial by plaintiffs (respondents here) and the point was not waived. Plaintiffs' counsel specifically stating that "*they* (defendants below) *never claimed payment*". (Transcript 59-60), and testimony was admitted subject to objection that it was not covered by the pleadings. (Transcript p. 50). (See Appendix 46(a), 47(a)-50(a), also transcript pages 47, 48, 49-50, and 59-60).

Defendants' counsel stated that "if the directed verdict is granted, then we will consider as to whether or not to put in any proof as to recoupment" (App. 65(a); Transcript p. 138). (Under Michigan's recoupment statute, where defendants' proven recoupment exceeds plaintiffs' claim, judgment may enter against plaintiff for the excess. (*C. L.* of 1948, Sec. 615.10; *Mich. St. Anno.* 27.835)).

Upon verdict being directed, defendants below did not go on with any proof of recoupment, nor request to do so, and the case there ended. No testimony being offered as to any of the grounds of recoupment, and having elected not to prosecute such claims, or request so to do, defendants have abandoned same. Recoupment is an affirmative defense; the burden of proof and proceeding with the evidence thereof rests upon the defendants.

(*Truax vs. Heartt*, 135 Mich. 150, at p. 154; Vol. 3 *Callaghan's Michigan Pleading & Practice*, Sec. 36.125, pages 465-466, and the many cases there cited).

The course elected by defendants below being abandonment of recoupment, they may not now urge any such right.

Abandonment may be of a cause of action or of a particular proceeding to enforce it, may be express or implied and may arise from acts or conduct or omission. (Vol. 1. *Corpus Juris Secun.*, page 1418, Sec. 138 and cases cited in note 44; Vol. 1 *Michigan Law & Practice Encyclopedia*, Sec. 34, p. 151).

Defendants below made no defense to plaintiffs' claim under the lease and admitted occupancy of the premises thereunder; they did not plead payment as required by Court Rule, but elected to rely solely upon alleged constructive eviction, upon which the Court, after full hearing, held against them; they abandoned their claims of recoupment. There was then no issue for re-trial, and the Court properly reversed and remanded for entry of judgment, which was such order as the case required (*Mich. Court Rule No. 72*, Sec. (g)).

II.

There was no denial of due process or of property or constitutional right.

There can be no question as to power to promulgate and establish rules of pleading and practice. Such power is inherent in Courts, and in Michigan is also given by constitutional and statutory provision. (*Mich. Const.* of 1908, Art. VII, Sec. 5; *Compiled Laws* of 1948, Sec. 691.21; *Mich. St. Ann.*, Sec. 27.34). (*Tomlinson vs. Tomlinson*, 338 Mich. 274, 276).

In judicial proceedings due process of law means according to the regular course of administration of justice, proceeding according to those rules and principles which have been stablished for the protection and enforcement of private rights. (16A *Corpus Juris Secundum*, Sec. 567, pp. 541-544). The function of rules of court is to regulate the practice of the Court, facilitate the transaction of its business, and frame the issues for hearing and determination. There is here nothing in the applicable rules which abrogate or modify any substantive law, and no question arises as to notice or opportunity to be heard and defend. All the issues presented for trial by the pleadings and under the rules were heard and passed upon by the Court, except those voluntarily abandoned by the defendants below, and [redacted] passed upon no issue remains for hearing or determination.

It is respectfully submitted that Writ of Certiorari should be denied.

Respectfully submitted,

BENJAMIN KLEINSTIVER,
KLEINSTIVER AND ANDERSON,

By Benjamin Kleinstiver
Attorneys for Respondents and Appellants.

Business Address:
1504-08 National Bank Bldg.,
Jackson, Michigan.

FILED
NOV 7
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 333

JAMES S. O'ROURKE, JR. and
JOAN O'ROURKE,
Petitioners and Appellees below,

vs.

HENRY W. SILL and
BERNICE E. SILL,
Respondents and Appellants below.

PETITION FOR RE-HEARING

PHILLIP C. KELLY,
Attorney for Defendants.
Business Address:
301-304 Reynolds Building,
Jackson, Michigan.

AMERICAN BRIEF AND RECORD COMPANY, FIFTY MARKET AVENUE, N.W.,
GRAND RAPIDS 2, MICHIGAN — PHONE GL 8-5226

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 333

JAMES S. O'ROURKE, JR. and
JOAN O'ROURKE,
Petitioners and
Appellees below,

vs.

HENRY W. SILL and
BERNICE E. SILL,
Respondents and
Appellants below.

PETITION FOR RE-HEARING

TO: The Honorable Chief Justice and the Justices of the Supreme Court of the United States:

This is the case in which judgment was entered against defendants without allowing them to be heard.

If you will examine only pages 14, 15, 46, 47, 48, 49, 50 and 51 of the Appendix, it will be seen that defendants denied owing plaintiffs and that the evidence offered by plaintiffs showed that liability of defendants and the amount of such liability, if any, were facts in dispute. A jury had been demanded and was hearing the case. The question of liability and its amount, if any, was for the jury, even without any evidence being presented by defendants, but furthermore, defendants had a right to present their evidence.

The direction of this judgment by the Court was in flagrant violation of the rights of defendants under the 7th and 14th Amendments to the United States Constitution. The protection of these constitutional rights demand that defendants, who were not heard at the Court below, be heard in this Court.

Respectfully submitted,

PHILLIP C. KELLY,
Attorney for Defendants.
Business Address:
301-304 Reynolds Building,
Jackson, Michigan.

CERTIFICATE OF COUNSEL

I, PHILLIP C. KELLY, Attorney for defendants, hereby certify that this Petition is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58.

Phillip C. Kelly